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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SHAPOUR MIRZAI, Defendant and Appellant.	B288370 (Los Angeles County Super. Ct. No. VA142320)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Remanded with directions.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Scott A. Taryle, Supervising Deputy Attorneys General, and Colleen M. Tiedemann, Deputy Attorney General, for Plaintiff and Respondent.

Shapour Mirzai was convicted following a jury trial of attempted premeditated murder, aggravated mayhem and assault with a deadly weapon. The jury also found true allegations Mirzai had personally inflicted great bodily injury during the attempted murder and the assault and had used a dangerous weapon, a knife, during the attempted murder and the aggravated mayhem. On appeal Mirzai contends his counsel improperly conceded his guilt at trial in violation of his Sixth Amendment right to control his defense. Mirzai also argues the court erred by failing to instruct the jury on the defense of unconsciousness and by imposing fines and fees without considering his ability to pay. We affirm the convictions and remand for the trial court to give Mirzai the opportunity to request a hearing to present evidence demonstrating his inability to pay the applicable fines, fees and assessments.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

On November 7, 2016 Mirzai was charged by amended information with attempted premeditated murder (Pen. Code, §§ 664, 187, subd. (a)),[1] aggravated mayhem (§ 205) and assault with a deadly weapon (§ 245, subd. (a)(1)).[2] The amended information specially alleged Mirzai had personally inflicted great bodily injury during the commission of the attempted

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[1] Statutory references are to this code unless otherwise stated.

[2] The amended information also charged Mirzai with assault by means of force likely to produce great bodily injury. (§ 245, subd. (a)(4).) This count was dismissed prior to trial on the prosecutor's motion.

murder and the assault (§ 12022.7, subd. (a)) and had used a "box cutter knife" during the attempted murder and the aggravated mayhem (§ 12022, subd. (b)(1)).

2. *Pretrial Proceedings*

During a pretrial conference on March 29, 2017 Mirzai addressed the court directly and requested the court replace the deputy alternate public defender representing him. (See *People v. Marsden* (1970) 2 Cal.3d 118.) Explaining his request at an in camera conference, Mirzai expressed frustration that his counsel had not kept him informed of his pretrial investigation and preparation. Mirzai also said he believed his counsel thought he was guilty, stating, "[W]henever I am talking to the video conference with my attorney, he believes I'm guilty. Because when I told him one day on those conference, counsel, we have chance to win, 75 percent, because the 25 percent I'm not counting on it because I had one stupid interview with the detective. So then his response is, 'How you want me to prove it. Tell me. You go and cut the guy.' What does that indication is? Indication is he already believes I'm guilty." The motion to replace counsel was denied.

At a pretrial conference one month later Mirzai's counsel informed the court Mirzai wished to represent himself. Mirzai explained he had not adequately expressed himself during the prior *Marsden* hearing and "begged" the court to conduct another in camera hearing. The court reluctantly agreed. Mirzai expressed concern his counsel had delayed in retrieving papers held by Mirzai's friend, which Mirzai stated were important for his defense. After a discussion regarding the contents of the documents, their purported importance and a recounting of the defense investigator's unsuccessful attempts to locate them, the

court denied the *Marsden* motion and resumed the pretrial conference. Back in the presence of the prosecutor Mirzai reiterated he did not want to represent himself but could not go forward with his current counsel. After a lengthy colloquy and a recess for Mirzai to review a waiver-of-representation form, the court denied Mirzai's request for self-representation, finding Mirzai "is not making it clear as to whether or not he wants to represent himself."

On August 23, 2017 defense counsel informed the court he was ready for trial, but Mirzai protested, stating he wanted to obtain a forensic expert to testify. Mirzai also explained he wanted to move to disqualify the trial judge, but his attorney refused to file the motion. For these reasons, Mirzai stated, he wished to represent himself. The court advised Mirzai of the serious disadvantages of self-representation and confirmed that he wanted to proceed without an attorney. Immediately after defense counsel was excused, Mirzai moved to disqualify the judge; and the case was reassigned. (See Code Civ. Proc., § 170.6.)

At the next pretrial conference, five days later, Mirzai told the court, "I do not want any kind of a deal. I want to go straight, directly to trial." Mirzai expressed concern over representing himself but still refused to be represented by his prior counsel because, "[M]y own attorney believes I am guilty." At that point a discussion was held off the record during which it appears Mirzai was informed his prior counsel would declare a conflict if reappointed. Accordingly, Mirzai agreed to have counsel reappointed, the alternate public defender's office declared a conflict; and counsel from the bar panel was appointed to represent Mirzai.

3. *Evidence at Trial*

Mahendra Ahir was the live-in manager of a hotel in Bell Gardens where many of the occupants were long-term residents. Mirzai lived in the hotel from 2010 to July 2016. At some point in late 2011 or early 2012 Mirzai was unable to pay his rent and volunteered instead to assist with minor repair work and maintenance around the hotel. Ahir agreed, and Mirzai continued to live in the hotel until 2016 without paying rent. Ahir testified he had considered Mirzai to be "a good family friend" and they got along very well.

The relationship changed in 2013 when Mirzai "got very upset" about the rate Ahir charged one of Mirzai's friends. Ahir stopped interacting with Mirzai and no longer gave him work to do around the hotel. Around the same time Mirzai claimed he was owed approximately $50,000 for the work he had done. In March 2016 Mirzai suggested Ahir evict him so that they could resolve the dispute in court. Ahir began eviction proceedings the same day. In April 2016 Ahir's attorney served Mirzai with a 60-day eviction notice. Mirzai ignored the notice and told Ahir it was "not [a] real notice." Ahir testified he could not interact with Mirzai at that point without Mirzai getting upset and telling him, "'you're going to pay for it' or things like that."

On the morning of July 2, 2016 the final eviction notice arrived in the mail, and Ahir slid it under Mirzai's door. Later that day Ahir observed Mirzai "going back and forth from his room. And he said now he's going to start playing his cards and we will see what he can do."

At approximately 3:00 p.m. on July 2, 2016 Ahir and his son, Prit Ahir,[3] were in one of the hotel's rooms fixing a toilet. Ahir testified that, as he was sitting on the ground in front of the toilet, "All of a sudden, something happened. And I saw the blood like coming out of my body, hitting the wall. . . . And the moment I turn around I see [Mirzai] with knife. And all he's doing is just cutting me. He wants to cut off my neck. . . . And I said 'Shapour, what you doing?' And he would not listen. He looked so mad, he could actually just—I thought that he's going to kill me." Ahir tried to fight back but was too weak from blood loss. Mirzai repeatedly cut Ahir on his face, neck and shoulder. Eventually Ahir was able to push Mirzai away long enough that Prit could grab Mirzai and pull him out of the bathroom. Ahir testified Mirzai then walked away calmly and said, "You will pay for this."

Ahir was in the hospital for two days after the attack and received approximately 300 stitches on multiple cuts on his face, neck and shoulder. He stated that, at the time of trial, two and a half years after the attack, he still did not have full sensitivity near his ear, could not completely close his mouth, had trouble speaking and eating and did not have full range of motion in his neck. He anticipated having surgery to remove scar tissue in hope of increasing his neck mobility.

Pallavi's testimony corroborated Ahir's regarding their relationship with Mirzai. She testified that on July 2, 2016, after receiving the eviction notice, Mirzai began acting "crazy," "upset" and "completely different." At the time of the attack Pallavi heard her son screaming and came into the hallway to see what

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[3] Because Ahir, Prit and Ahir's wife, Pallavi Ahir, share the same surname, we refer to Prit and Pallavi by their first names.

was happening. She saw Mirzai, bleeding, walk down the hall and sit on the steps in the lobby. When she walked past him, Mirzai said "I play my game" or "I play my card."

Prit testified he had seen his father and Mirzai arguing earlier in the day on July 2, 2016. At the time of the attack he was standing behind Ahir in the doorway of the bathroom. Prit testified he saw Mirzai walk up and down the hallway multiple times, each time looking into the room where he and his father were fixing the toilet. After a few mintues Mirzai came into the room, "nudged" Prit aside and grabbed Ahir by the neck. Ahir screamed, and Prit saw blood on the floor. Prit recounted that Mirzai "kept cutting at him and hitting—he kept on elbowing my dad on the shoulder area." Prit yelled at Mirzai to stop and tried to pull him off Ahir, but he was not strong enough. Mirzai eventually started to walk away, and Prit pushed him out of the room.

Officer Victor Ruiz of the Bell Gardens Police Department arrived at the hotel shortly after the attack in response to an emergency call. He observed Mirzai sitting on the steps in the lobby. Mirzai's "face and neck were extremely bloody, along with his white T-shirt." Ruiz said Mirzai appeared to be bleeding from his neck. A box cutter was on the step next to Mirzai. Ruiz testified, "[Mirzai] stated that he had stabbed a victim and he stabbed himself. He said he did not want to live and that he wanted to kill himself." According to Ruiz, Mirzai was agitated and upset.

Bell Gardens Police Officer Edward Curbelo also arrived at the hotel shortly after the attack. He observed Mirzai sitting on the lobby steps "blood soaked and [with a] small pooling of blood just by his feet." Curbelo asked Mirzai what had happened;

Mirzai replied that Ahir owed him money, had hid his mail and was evicting him. Curbelo testified, "[Mirzai] said he had cut [Ahir] and, also, cut himself because he didn't want to live." "[He] said 'This would have never happened, if he would have paid me.'" Curbelo recalled Mirzai being calm and compliant.

Mirzai testified in his own defense. He recounted that, shortly after he began residing at the hotel in 2010, Ahir told him he could work two to three hours a day in lieu of paying rent. However, he eventually worked four to eight hours per day and was "a slave for [Ahir]." Mirzai acknowledged asking Ahir to begin eviction proceedings and admitted he received a 60-day eviction notice in April 2016 and a five-day notice around June 27, 2016.

Mirzai testified that, when he received the eviction notice on the morning of July 2, 2016, the time to contest the eviction had already expired. Mirzai was frustrated and angry, believing Ahir had hidden the notice from him. Mirzai continued, "[A]ll I had 60 cents in my name in this world. I walk across the street—the store I bought cigarette for 50 cents. I sit down . . . on the sidewalk on the street. I smoke a cigarette. At that time I decided to suicide." Mirzai determined his kitchen knife was not sharp enough to kill himself without suffering, so he sharpened it on the hotel's key-making machine. He then gave away his belongings to other residents and hotel staff because he did not want Ahir to have his personal property after he had committed suicide.

As he was returning to his room, Mirzai passed Ahir in the hallway. According to Mirzai, Ahir said, "Get out of my hotel, you loser." Mirzai testified, "When he say that, I just—my mind was just—I wasn't able to breathe. I wasn't—my heart want to come

out of my chest. And from other side I'm fighting with myself not to do suicide." Mirzai went to the back door of the hotel to get some fresh air. When he came back to his room, he was thinking of everything he had done for Ahir over the prior eight years and that he now had no place to live. At that point, Mirzai testified, "I was black out. . . . [E]verything went dark on me." The next thing he said he remembered was being in the bathroom with his hand on Ahir's throat. He testified, "When I look at myself, [Ahir] with blood all over and the box cutter was in my right hand. As soon as I saw, I know what's happened. . . . I put my hand down and let the man go." When asked during direct examination whether he caused the injuries to Ahir, Mirzai replied, "I have no idea. I don't believe I did. . . . I don't remember it." Mirzai stated he "absolutely" did not want to kill Ahir and would never try to kill anyone over money.

On cross-examination Mirzai was asked about an interview with a police detective the day after the incident. When the prosecutor asked Mirzai if he had told the detective that he was angry with Ahir, that he had wanted to hurt him and teach him a lesson, Mirzai testified he never made these statements. On re-cross, Mirzai clarified he did not recall making those statements to the detective, but it was possible he had. In rebuttal the prosecution presented the testimony of a police detective who testified he interviewed Mirzai for an hour on July 3, 2016. During the interview Mirzai said he had been angry with Ahir and wanted to teach him a lesson he would remember for the rest of his life.

Four surveillance videos of the hotel lobby and hallway taken the day of the incident were played for the jury and admitted into evidence. The footage showed Mirzai enter the

building a few minutes before 3:00 p.m. on July 2, 2016 and walk past Ahir in the lobby. The men appeared to have an interaction as Ahir entered the room with the broken toilet. Approximately two minutes later Mirzai entered the hallway and walked to the back of the building, returning after a few seconds. Mirzai then walked halfway down the hall, stopped near the door of the room in which Ahir and Prit were working, turned around and returned to where he had entered. Thirty seconds later, Mirzai re-entered the hallway and went into the room where Ahir and Prit were working. After approximately 90 seconds Mirzai walked out of the room covered in blood. He momentarily turned back and appeared to say something before continuing down the hallway to the lobby. As he walked, he appeared to be cutting his throat with a knife, which he continued to do intermittently until the police arrived. During this time Mirzai had multiple interactions with Pallavi and Prit, some of them heated, as they walked from where Ahir was lying in the hallway to the front of the hotel and back.

4. *Defense Counsel's Concessions in Closing Argument*

During closing argument defense counsel conceded Mirzai committed an assault with a deadly weapon. Counsel argued there was no evidence Mirzai intended to permanently disable or disfigure Ahir, as required for a finding of aggravated mayhem, but also conceded Mirzai had intended to injure Ahir and thus was guilty of the lesser included offense of mayhem.

Turning to the attempted premeditated murder charge, counsel emphasized Mirzai's repeated statements he did not intend to kill Ahir. Counsel also argued Mirzai's actions and statements on July 2, 2016 such as Mirzai's testimony he had not wanted Ahir to have his personal belongings after he committed

suicide, were inconsistent with an intent to kill Ahir. After reiterating Mirzai's alleged lack of memory of the attack, counsel stated, "At best, it would be second degree attempted murder. Not premeditated and deliberate." Counsel then recounted the stress Mirzai felt that day, stating, "And he snapped. And he tells you he snapped. And he tells you he came to it when he had Mr. Ahir around the throat and he stopped. He attempted voluntary manslaughter. And I believe that's the crime. If you're going to find him guilty of anything in the homicide, it is attempted voluntary manslaughter."

5. *The Verdict and Sentence*

The jury found Mirzai guilty of attempted premeditated murder, aggravated mayhem and assault with a deadly weapon. The jury found true the allegations Mirzai had used a knife during the attempted murder and aggravated mayhem and had personally inflicted great bodily injury during the attempted murder and assault.

The court sentenced Mirzai to an aggregate state prison term of life plus four years: an indeterminate term of life for attempted premeditated murder, plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)) and one year for the dangerous weapon enhancement (§ 12022, subd. (b)(1)). The court imposed and stayed pursuant to section 654 a concurrent term of life for aggravated mayhem and a concurrent middle term of three years for assault with a deadly weapon. The court struck the great bodily injury enhancement on the assault count and the weapon enhancement on the aggravated mayhem count in furtherance of justice. The trial court imposed a $30 court facilities assessment for each conviction (Gov. Code, § 70373); a $40 court operations assessment for each conviction (§ 1465.8);

and a $300 restitution fine (the statutory minimum) (§ 1202.4, subd. (b)). The court imposed and suspended a corresponding $300 parole revocation fine (§ 1202.45). Mirzai did not object to the imposition of these fines, fees and assessments.

DISCUSSION

1. *Defense Counsel's Statements During Closing Argument Did Not Violate Mirzai's Sixth Amendment Right to Counsel*

a. *Governing law and standard of review*

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; accord, *McCoy v. Louisiana* (2018) __ U.S. __ [138 S.Ct. 1500, 1507, 200 L.Ed.2d 821] (*McCoy*).) Generally, "[t]rial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.' [Citation.] Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*McCoy,* at p. 1508; accord, *People v. Frierson* (1985) 39 Cal.3d 803, 812 [counsel has "traditional power to control the conduct of a case" but "with respect to certain fundamental decisions in the course of a criminal action, a counsel's control over the proceedings must give way to the defendant's wishes"]; cf. *Faretta v. California* (1975) 422 U.S. 806, 820 [95 S.Ct. 2525, 45 L.Ed.2d 562] [the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however

expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally"].) When counsel overrides a defendant's autonomy on a fundamental decision that is reserved for the client, the defendant's Sixth Amendment rights are violated. (*McCoy*, at pp. 1508-1509.) "A violation of the client's right to maintain his or her defense of innocence implicates the client's autonomy (not counsel's effectiveness)." (*People v. Eddy* (Mar. 26, 2019, C085091) __ Cal.App.5th __ [2019 Cal.App. Lexis 257, at p. *12; accord, *McCoy*, at p. 1511.) Accordingly, such an error is structural and not subject to harmless error review. (*McCoy,* at p. 1511; *Eddy*, p. *12.)

We review the legal question whether defendant's constitutional right to counsel was violated de novo. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894; *People v. Sanchez* (2017) 18 Cal.App.5th 727, 734; *In re Lugo* (2008) 164 Cal.App.4th 1522, 1535.)

b. *The record does not contain evidence Mirzai unequivocally objected to the concessions made by defense counsel during closing argument*

Mirzai contends defense counsel's concessions of guilt during closing argument violated his constitutional right to counsel because they "undermin[ed] Mirzai's expressed assertions of innocence." To support his argument, Mirzai relies on the United States Supreme Court's recent decision in *McCoy*, *supra*, 138 S.Ct. 1500, in which the Court held defense counsel's concession of his client's guilt to the jury violated the defendant's

constitutional rights. In *McCoy* defense counsel informed McCoy two weeks before trial that he intended to concede McCoy was guilty of a triple homicide. McCoy insisted he was innocent and had been out of state when the murders occurred. Two days before trial McCoy sought to terminate his counsel's representation, informing the court he disagreed with counsel's intent to concede guilt. The request to relieve counsel was denied. During counsel's opening statement, out of earshot of the jury, McCoy again informed the court he disagreed with counsel's concession of guilt. Nevertheless, defense counsel told the jury it was "'unambiguous'" that "'my client committed three murders.'" (*McCoy*, at p. 1507.)

The Supreme Court reversed the conviction, holding that, "[A] defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. . . . [I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense . . . ." (*McCoy*, *supra*, 138 S.Ct. at p. 1505.) The Court emphasized its holding was based on McCoy's "intransigent," "unambiguous" and "intractable" objections to counsel's admission of guilt. (*Id.* at pp. 1507, 1510.) In doing so, the Court explained the existence of McCoy's repeated unambiguous objections in the record distinguished the case from *Florida v. Nixon* (2004) 543 U.S. 175 [125 S.Ct. 551, 160 L.Ed.2d 565] (*Nixon*) in which the Court had held counsel's assistance was not deficient for admitting guilt at trial without the defendant's express consent, because "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective. Nixon 'was generally unresponsive' during discussions

of trial strategy, and 'never verbally approved or protested' counsel's proposed approach. [Citation.] Nixon complained about the admission of guilt only after trial. [Citation.] McCoy, in contrast, opposed [counsel's] assertion of guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." (*McCoy*, at p. 1509.) In distinguishing *Nixon* the *McCoy* Court reaffirmed its holding that "'[n]o blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy [of concession]." (*McCoy*, at p. 1505.)

McCoy and *Nixon* represent two ends of a spectrum: In *McCoy* the defendant, immediately prior to and during trial, vociferously disagreed with any concession of guilt; in *Nixon* the record was silent as to defendant's opinion of counsel's strategy. This case lies between those extremes. During two pretrial conferences Mirzai complained generally that his counsel thought he was guilty of the crimes charged. Those statements lend some support to the argument Mirzai had communicated an intent to maintain his innocence at trial. However, the statements were made many months prior to trial in the context of Mirzai's ultimately successful effort to remove that attorney from the case. There is no indication Mirzai had any conflict with his trial counsel regarding trial strategy or objectives. Mirzai's trial testimony likewise does not demonstrate an unambiguous intent to maintain his innocence of any wrongdoing whatsoever. While he testified he did not believe he hurt Ahir and had no intent to kill him, Mirzai also said he did not remember the incident and "had no idea" if he had caused Ahir's injuries. In addition, he admitted he remembered holding Ahir by the neck with the box

cutter in his hand and being covered in blood, which prompted him in the moment to think, "I know what's happened."

On this record we cannot say Mirzai voiced an "intransigent objection" to counsel's admission of guilt. (*McCoy*, *supra*, 138 S.Ct. at p. 1510.) A general and ambiguous statement months before trial that his (soon-to-be-replaced) counsel believed he was guilty does not preclude the possibility that Mirzai, after hearing the prosecution's case and evaluating his own testimony, agreed with his counsel's reasonable strategy to concede guilt to several of the lesser offenses in the hope of avoiding conviction on the most serious charges. Further, Mirzai admitted he was present during the incident, held the weapon, laid hands on the victim and stated he could not remember what he had done or what he was thinking. Unlike McCoy, who maintained his absolute innocence and claimed he was not present at the crime scene, Mirzai's testimony was entirely consistent with a concession that Mirzai was guilty of assault, mayhem and attempted voluntary manslaughter. Accordingly, unlike in *McCoy* this record does not demonstrate an unequivocal disagreement with counsel's concession of guilt. No violation of Mirzai's constitutional right to counsel occurred.

Our analysis is consistent with other California courts that have reviewed the issue since the *McCoy* case. For example, in *People v. Eddy, supra*, 2019 Cal.App. Lexis 257, our colleagues in the Third District held a defendant's right to counsel had been violated by his counsel's admission of his guilt in closing argument. In that case defense counsel presented an innocence defense during his opening statement, and the defendant did not testify. The day before closing argument counsel informed the defendant he intended to concede defendant had committed a

lesser included offense. During a posttrial *Marsden* hearing defense counsel explained he knew the defendant wanted to go forward with an innocence defense, but "'I was committed to making the closing argument that we're going to go for the voluntary manslaughter. I understand [what] his position was, but that was the best—in my professional opinion that was the best tactic . . . .'" (*Id.* at p. *8.) The defendant himself told the trial court, "'I advised him not to go that route, and he had done it anyway.'" (*Id.* at p. *9.) The Third District held, "The *Marsden* hearing record establishes that trial counsel knew that defendant did not agree with the strategy of conceding manslaughter in closing argument . . . . [I]n context it is clear counsel was instructed not to make that argument but did so anyway because of counsel's judgment that it was in defendant's best interests." (*Id.* pp. *14-15.) Here, in contrast, there is nothing in the record to establish defense counsel knew Mirzai objected to a concession strategy or that Mirzai ever instructed his counsel not to pursue such a tactic. In the absence of such a record, there is no basis on which to find a constitutional violation. (See *People v. Lopez* (2019) 31 Cal.App.5th 55, 66 ["we have found no authority, nor has appellant cited any, allowing extension of *McCoy's* holding to a situation where the defendant does not expressly disagree with a decision relating to his right to control the objective of his defense"].)

The United States Supreme Court's analysis in *McCoy* and our holding Mirzai's constitutional right to counsel was not violated are also fully consistent with the California Supreme Court's reasoning in *People v. Frierson*, *supra*, 39 Cal.3d 803, in which the Court held counsel's failure to present a defense over defendant's objection was constitutional error. The *Frierson*

Court explained, "We emphasize that our holding rests on the fact that the record in this case *expressly* reflects a conflict between defendant and counsel . . . . Thus, nothing in this opinion is intended to suggest that—in the absence of such an express conflict—a court is required to obtain an on-the-record, personal waiver from the defendant whenever defense counsel chooses to rest without putting on a defense." (*Id.* at p. 818, fn. 8; accord, *People v. Cain* (1995) 10 Cal.4th 1, 30 ["[i]t is not the trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach to presenting the defense"].)

2. *The Trial Court Had No Sua Sponte Duty To Instruct the Jury on Unconsciousness*

A trial court has a sua sponte duty to instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Brooks* (2017) 3 Cal.5th 1, 73; accord, *People v. Diaz* (2015) 60 Cal.4th 1176, 1189.) "It is also well settled that this duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*Brooks,* at p. 73; see *People v. Salas* (2006) 37 Cal.4th 967, 982 [no right to instruction on affirmative defense unsupported by substantial evidence].) Whether there is evidence that, if believed, would support a particular defense instruction is a question of law subject to de novo review. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1145.)

"Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417; see § 26.) "To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.'" (*Halvorsen*, at p. 417.) The defendant has the burden of producing evidence of unconsciousness. (*People v. Froom* (1980) 108 Cal.App.3d 820, 830.)

Although Mirzai does not contend he relied on the defense of unconsciousness at trial, he argues the court had a duty to instruct the jury on that defense based on his testimony that he did not recall the attack. His testimony, however, did not constitute substantial evidence warranting an unconsciousness instruction. (See *People v. Rogers* (2006) 39 Cal.4th 826, 888 ["defendant's own testimony that he could not remember portions of the events, standing alone, was insufficient to warrant an unconsciousness instruction"]; *People v. Froom*, *supra*, 108 Cal.App.3d at p. 829 [evidence defendant was forgetful and told a psychiatrist he "'sort of awakened'" after the crime was insufficient to warrant unconsciousness instruction]; *People v. Coston* (1947) 82 Cal.App.2d 23, 40 ["[t]here must be something more than his mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act"].)

Recognizing this weakness in his argument, Mirzai argues his suicide attempt and Pallavi's testimony he was acting "crazy" and "completely different" after receiving the eviction notice support an inference he was unconscious during the attack. However, despite his distress and unusual behavior that day,

Mirzai recalls the events immediately before and after the attack in their entirety. There is no evidence, other than his own testimony, of unconsciousness at the specific moment he attacked Ahir. Further undermining his claim of unconsciousness is Mirzai's confession to two police officers immediately after the attack that he had cut Ahir with a knife. Mirzai's professed lack of memory without any other evidence supporting an inference of unconsciousness during the attack was not sufficient to require an unconsciousness instruction. (See *People v. Rogers, supra,* 39 Cal.4th at p. 888.)

3. *Mirzai Has Failed To Demonstrate Cumulative Error Compelling Reversal*

Mirzai contends the errors he described, at least when considered cumulatively, compel reversal. For the reasons we have explained, none of the errors he alleges deprived Mirzai of a fair trial. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].)

4. *Remand Is Necessary To Afford Mirzai the Opportunity To Request a Hearing Concerning His Ability To Pay Fines, Fees and Assessments*

a. *Mirzai's argument under Dueñas has not been forfeited*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held it violated due process under both the United States and California Constitutions to impose a court operations assessment as required by section 1465.8 or the court facilities assessment mandated by Government Code section 70373, neither of which is intended to be punitive in nature, without

first determining the convicted defendant's ability to pay. (*Dueñas*, at p. 1168.) A restitution fine under section 1202.4, subdivision (b), in contrast, is intended to be, and is recognized as, additional punishment for a crime. Section 1202.4, subdivision (c), provides a defendant's inability to pay may not be considered a compelling and extraordinary reason not to impose the restitution fine; inability to pay may be considered only when increasing the amount of the restitution fine above the minimum required by statute. To avoid the serious constitutional question raised by these provisions, we held, although the trial court is required to impose a restitution fine, the court must stay execution of the fine until it is determined the defendant has the ability to pay the fine. (*Dueñas*, at p. 1172.)

In supplemental briefing filed with the permission of this court, Mirzai contends under *Dueñas,* the assessments and fees imposed by the trial court should be reversed and the execution of the restitution fine stayed. The People argue Mirzai forfeited this issue on appeal because he failed to raise it in the trial court. However, as we recently explained when rejecting the same argument in *People v. Castellano* (Mar. 26, 2019, B286317) __ Cal.App.5th __ [2019 Cal.App. Lexis 258] (*Castellano*), at the time the defendant was sentenced, "*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been

anticipated at the time of trial, reviewing courts have declined to find forfeiture." (*Castellano*, at p. *5; see also *O'Connor v. Ohio* (1966) 385 U.S. 92, 93 [87 S.Ct. 252, 17 L.Ed.2d 189]; *People v. Doherty* (1967) 67 Cal.2d 9, 13-14; see generally *People v. Brooks*, *supra*, 3 Cal.5th at p. 92 ["'[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"']; but see *People v. Frandsen* (Apr. 4, 2019, B280329) __ Cal.App.5th __ [2019 Cal.App. Lexis 309].) We similarly decline to apply the forfeiture doctrine to Mirzai's constitutional challenge.

b. *A limited remand is appropriate*

Relying on *Dueñas,* Mirzai asserts the court facilities and operations assessments should be reversed, and execution of the restitution fine stayed, unless and until the People prove he has the present ability to pay the fine. As we explained in *Castellano*, "*Dueñas* does not support that conclusion in the absence of evidence in the record of a defendant's inability to pay. . . . [¶] . . . [A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano*, *supra*, 2019 Cal.App. Lexis 258 at pp. *6-7; accord, *Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168-1169.) If the trial court determines, after considering the relevant factors, a defendant is unable to pay, then the fees and assessments cannot be imposed; and

execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant's ability to pay has been restored. (*Dueñas*, at pp. 1168-1169, 1172; *Castellano*, at p. *7.)

As Mirzai's conviction and sentence are not yet final, we remand the matter to the trial court so that he may request a hearing and present evidence demonstrating his inability to pay the fines, fees and assessments imposed by the trial court.

DISPOSITION

The convictions are affirmed, and the matter is remanded to give Mirzai the opportunity to request a hearing on his ability to pay the fines, fees and assessments imposed by the trial court. If he demonstrates the inability to pay, the trial court must strike the court facilities assessments (Gov. Code, § 70373) and the court operations assessments (§ 1465.8); and it must stay the execution of the restitution fine. If Mirzai fails to demonstrate his inability to pay these amounts, the fines, fees and assessments imposed may be enforced.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.